86-1108

No. ——

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF VERMONT,
Petitioner,

v.

RICK COX,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

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QUESTION PRESENTED

Whether the Fifth Amendment privilege against compelled self-incrimination applies to a counseled defendant's unwarned statements, made during a court-ordered interview and contained within a presentence investigation report, following nolo contendere pleas to three misdemeanors, when consideration of the statements at the sentencing hearing did not expose the defendant to an enhanced penalty or provide a basis for future prosecution of other crimes?

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OPINION BELOW

The opinion of the Supreme Court of Vermont appears in Appendix A and is published in 147 Vt. —— (1986), which also appears in 517 A.2d —— (1986).

JURISDICTION

The judgment of the Supreme Court of Vermont, entered on October 10, 1986 (Appendix A), vacated respondent's sentence, and, on remand, required that a new presentence investigation (PSI) report be prepared for use at resentencing by a judge who had not reviewed the stricken PSI report. The Supreme Court of Vermont denied a timely petition for rehearing on November 3, 1986. (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

1. Summary of Proceeding Below

At the beginning of the sentencing hearing, defense counsel orally claimed "that it must be constitutionally necessary for the probation officer who is preparing a PSI to inform as to police officers would tell a defendant his rights he is waiving and what trouble he might get himself into by being fully open and not remaining silent." T.13, Sent.Hrg. (Jan. 25, 1984). On appeal appellant argued that "[t]he PSI report relied upon by the trial court in sentencing appellant contained information obtained in violation of appellant's privilege against self-incrimination and right to counsel." (Appellant's Brief, p. 6). This claim was premised on the Fifth Amendment of the United States Constitution and its counterpart, Chapter I, Article 10, in the Vermont Constitution. The Supreme Court of Vermont based its decision solely on the federal protection provided by the Fifth Amendment.

2. Pertinent Factual Background

Respondent was originally charged by information with three counts of kidnapping in violation of a state statute, 13 V.S.A. § 2401. Following a plea agreement, the felony counts were amended to three misdemeanor counts of simple assault to which the respondent entered pleas of nolo contendere. Due to the gravity of the criminal conduct, which arose upon nonpayment of a debt for the

purchase of drugs, a PSI report was ordered at the December 9, 1983 change of plea hearing. The report was filed at the court along with a letter from defense counsel who protested the consideration of this report by the judge at sentencing.

The letter was treated as a motion to excise. The court did strike certain portions of the report but stated on the record that the report should contain as much material as possible pertaining to the defendant's background. See App.E. While the court indicated its willingness to hear evidence regarding the defense objections to the report, no evidence was proffered. Defense counsel made a claim regarding the need for constitutional protections surrounding the taking of statements during a presentence interview. Counsel represented that although the defendant, who was interviewed while incarcerated for lack of bail, expressed an interest in speaking with the investigator at the public defender's office, the probation officer insisted the interview could not be postponed and left the respondent with a "now or never" choice. No evidence was taken from the probation officer regarding either this choice or the nature of the interview and the style of questioning, if any, which was employed. The defendant, however, was afforded his right of allocution at the sentencing hearing.

The court sentenced the respondent to three consecutive terms of confinement totalling eighteen months to three years, despite the recommendations of both parties for a lesser period of incarceration. The Supreme Court of Vermont struck these sentences and remanded the case for the preparation of a new PSI report and resentencing. The Court below concluded that a defendant who is awaiting sentencing may invoke the federal privilege against self-incrimination in order to prevent the possible enhancement of his sentence. Appendix A. The Court failed to discuss the nature of the enhancement. The Court also refused to grant the State's motion for re-

argument which sought a remand to the lower court for an evidentiary hearing on the question of whether the interview constituted custodial interrogation.

REASONS FOR GRANTING THE WRIT

Introduction

This Court is presented with the opportunity to decide whether the scope of the Fifth Amendment privilege extends to a non-capital, post-conviction, presentence situation, not previously considered by this Court, and expressly left open by its decision in *Estelle v. Smith*, 451 U.S. 454, 469, n.13. (1981). The question of the applicability of the federal privilege against compelled self-incrimination in the presentence interview stage in non-capital cases is one of obvious importance to defendants, correctional personnel who are charged with gathering defendant's background to aid the courts, and judges who may consider unwarned statements when making individualized sentencing determinations.

A presentence investigation report conveying the broadest information about a defendant's characteristics is highly relevant, if not essential, to the imposition of an appropriate sentence. *Wasman v. U.S.*, 468 U.S. 559, 563 (1983); *Williams v. N.Y.*, 337 U.S. 241 (1949).[1] The Due Process Clause of the Fifth Amendment has insured the truthfulness and accuracy of material considered by the court at sentencing, *U.S. v. Tucker*, 404 U.S. 443 (1972), *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948). Aside from these guarantees, however, the improper application of the privilege against compelled self-incrimination creates an obstacle to the gathering of information, and to the extent the information is limited, interferes with the exercise of judicial discretion at sentencing.

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[1] PSI reports are generally required in Vermont pursuant to 28 V.S.A. § 204(a) and V.R.Cr.P.32(c). (See Apps. C and F.) They are mandated in federal court pursuant to 18 U.S.C. § 3552.

The decision below conflicts with numerous decisions of other state courts and also with decisions of two Courts of Appeals. Thus, when faced with the issue of judicial reliance on a defendant's unwarned statements made to a probation officer, in the context of a presentence interview, following guilty pleas or their equivalent, lower courts diverge in their application of the Fifth Amendment privilege. The decision below is incorrect and reversal is mandated because the lower court erroneously extended the Fifth Amendment's protections, ruled on the basis of an inadequate evidentiary sentencing record, and mistakenly relied on *Estelle v. Smith*.

1. The Opinion Below Raises An Important and Recurring Question of Federal Law Which Has Not, But Should Be, Decided By This Court.

The Court below held that a counseled defendant who has pled nolo contendere to reduced charges and is interviewed for a court-ordered PSI report retains his Fifth Amendment privilege. See Appendix A. The lower court erroneously relied on *Estelle v. Smith* when it viewed the defendant's sentence as enhanced simply because the sentencing judge imposed a sentence that was in excess of the recommendations of both parties although it was within the statutory limits.[2]

The extent of the reach of the protections of the Fifth Amendment, which trigger Miranda warnings during a presentence interview,[3] is an important and recurring question of federal law which was not decided by this

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[2] Any "enhancement" to sentencing here is radically different from that obtained in a capital case when the death penalty may be the ultimate outcome. Enhancement takes place when an additional penalty is imposed, *Estelle v. Smith*, or, upon resentencing, when a higher sentence is ordered. *Wasman v. U.S.*, 468 U.S. at 569. Here the respondent was sentenced only once within the statutory guidelines.

[3] The opinion below never decided whether the interview constituted custodial interrogation.

Court in *Estelle v. Smith, supra.* It is necessary that this Court address itself to an analysis of the reach of the Fifth Amendment privilege in the factual context of a presentence interview in order to take the next step in defining the scope of the privilege.

This Court's holding in *Estelle v. Smith*, that the Fifth Amendment privilege is applicable to the penalty phase of a bifurcated capital proceeding, is limited to the "distinct circumstances" which were presented in that case. *Estelle*, 451 U.S. at 466. Some lower courts have read *Estelle* narrowly: *Baumann v. United States*, 692 F.2d 565, 576 (9th Cir. 1982) ("We believe it appropriate to read *Estelle* narrowly."); *Matter of Jose D.*, 485 N.E.2d 1025, 1027 (N.Y.C.T.App. 1985) ("We note that *Estelle* has been limited to its unique facts"); *Trimmer v. State*, 651 S.W.2d 904, 906 (Tex. App. 1 Dist. 1983) (although finding that the Texas Criminal appellate court had not addressed the issue, the court refused to extend *Estelle*, and thus refused to apply the federal privilege outside the unique set of circumstances presented in *Estelle*).

Other courts have relied on additional or different reasons to prevent the extension of the privilege to routine PSI interviews. See, *Com. v. Burton*, 301 A.2d 675, 677 (Pa. 1973) ("The purpose of *Miranda* would not be served if we were to extend its application to the presentence interview."); *People v. Williams*, 454 N.E.2d 220, 242 (Ill. 1983) (Illinois statute provides constructive notice to defendant that PSI might be used against him and no privilege attaches to communication between a defendant and probation officer.); *Gibson v. State*, 718 P.2d 283, 290 (Idaho 1986) (limiting *Estelle* to its facts and finding that the psychiatrist's section of PSI did not influence the court to find aggravating circumstances, and no violation of either federal or Idaho law.); *People v. Santana*, 134 Cal.App.3d 773, 779 (1982) (reliance on role of probation officer, public policy arguments and inappropriateness of *Miranda*); *Burch v. State*, 450 N.E.2d 528,

530 (Ind. 1983) (reliance upon *Baumann*), and cited with approval in *Lang v. State*, 461 N.E.2d 1110, 1115-1116 (Ind. 1984) ("At the time of the presentence interview, the guilt determination has been concluded and statements which the defendant makes cannot be used to convict him of any crime." "No potential for incrimination is present (at PSI interview) . . ."); *United States v. Dickson*, 712 F.2d 952, 954, n.1 (5th Cir. 1983) (because of entry of guilt, consideration of privilege claim foreclosed); *Booth v. Commonwealth*, 675 S.W.2d 856 (Ky. 1984) (no custodial interrogation then no necessity for *Miranda* warnings); *People v. Burton*, 205 N.W.2d 873, 875 (Mich. Ct. App. 1973) lv.den. 389 Mich. 795 (1973) (defendant's guilt already determined on principle charge, privilege inapplicable at PSI interview) followed in *People v. Daniels*, 386 N.W.2d 609, 612 (Mich. App. 1986).

Although *Estelle* left open the question of whether the same Fifth Amendment concerns present in that case applied to other types of interviews that might be used at the sentencing stage of a criminal proceeding, *Estelle*, 451 U.S. at 469, n.13, some lower courts have ignored this Court's cautionary proviso and instead read *Estelle* expansively. E.g., *United States v. Chitty*, 760 F.2d 425, 431 (2d Cir. 1985); *United States v. Wilson*, 598 F.Supp. 138, 142 (E.D. Pa. 1984); *State v. Kerekes*, 673 P.2d 979, 981 (Ariz. App. 1983).

It is clear that a conflict in decisions is presented to this Court on the precise issue raised by the opinion below. The federal question was properly raised in the lower court by defendant's counsel at the sentencing hearing. This Court is presented with a question which demands immediate attention since this Court has not spoken since *Estelle v. Smith* on the applicability of the Fifth Amendment privilege to the sentencing stage of a typical criminal prosecution.

2. The Decision Below Conflicts With Numerous Decisions of Other State Courts And Also With Decisions Of Two Courts Of Appeals.

The decision below decided a federal question, which conflicts with decisions of other lower courts. The conflict is on an important issue of federal law: does a convicted, counseled, defendant retain the Fifth Amendment privilege during a routine PSI interview after he has entered nolo pleas and where his sentence is not enhanced?

The Court below ruled that the defendant had rightfully asserted his Fifth Amendment privilege during a routine PSI interview, and therefore the statements subsequently obtained were involuntary and should not have been relied upon by the sentencing judge. That part of the court's decision which holds the federal privilege against compelled self-incrimination applies at the PSI interview stage conflicts with several appellate decisions from state and federal courts which have found the privilege inapplicable in this setting.

The opinion below squarely conflicts with four state appellate decisions which considered the issue of whether *Miranda* warnings need be given prior to the PSI interview. *Burch*, *supra* at 529-530 (Miranda warnings inapplicable to presentence interview). For the same result, see *Santana*, at 739-740; *Burton* (Pa.) at 677; *Booth v. Com.*, 651 S.W.2d 856, 904.

The opinion below conflicts in principle with eight other state appellate decisions: *Lang*, 461 N.E.2d at 1115 (Ind. 1984) (PSI not critical stage demanding attorney and "no potential for incrimination present" at this stage); *Gibson*, 718 P.2d at 290 (since unwarned statements in psychiatric part of PSI where not used to aggravate sentence, Fifth Amendment privilege inapplicable); *Burton*, 205 N.W.2d at 875 (privilege not extended to PSI interview); *Williams*, 454 N.E.2d at 242 (Fifth Amendment right to remain silent not violated by probation officer's testimony at sentencing hearing); *State v. Hicks*,

714 P.2d 105, 107 (Kan. App. 1986) (no Fifth Amendment privilege at PSI stage where no statements made which led to uncharged criminal activity); *Trimmer*, 651 S.W.2d at 907 (no right to silence attaches at PSI interview); *Matter of Jose D*, 485 N.E.2d at 1026 (Miranda warnings inapplicable at post juvenile findings, predisposition stage); *Comm. v. Allen*, 489 A.2d 909, 911 (Pa. Sup. 1985) (where no threat of contempt or harsher sentence is present, privilege is waived).

The opinion below is in direct conflict with a Ninth Circuit case, *Baumann v. United States*, in which a panel of the 9th Cir. held that "neither *Estelle* itself, nor the general principles announced in *Miranda*, require that a convicted defendant be warned of his right to counsel and his right to remain silent prior to submitting to a routine, authorized presentence interview." *Baumann*, 692 F.2d at 576.[4] *Baumann* involved a non-capital proceeding where the Ninth Circuit rejected the argument that Miranda warnings are necessary at the post-conviction, presentence stage because the policies underlying *Miranda* would not be served in a setting where information is only obtained to assist the court for sentencing purposes. *Id.* at 576-77. In distinguishing *Estelle*, the Court stated that "there is a substantial difference between a psychiatric examination of the defendant in a capital case which seeks to elicit evidence from the defendant relating to the critical aggravating factor of dangerousness, and a "routine" presentence interview (citation omitted), restricted to gathering information upon which the district court, in

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[4] *Baumann* itself is only apparently in conflict with another Ninth Circuit case, *Jones v. Cardwell*, 686 F.2d 754 (1982), in which a panel held a convicted defendant could properly claim the protection of privilege. In *Cardwell*, in contrast to *Baumann*, the information obtained during the PSI interview was used by the sentencing judge to *enhance* defendant's sentence. The court reserved decision on whether or under what circumstances a defendant is entitled to *Miranda* warnings in the post-conviction, presentence setting. *Id.* at 757, n.2.

its discretion, may rely when imposing sentence." *Id.* at 576.

Likewise the Fifth Circuit has noted that a Fifth Amendment self-incrimination claim does not extend to alleged violations at a presentence interview once a defendant has pled guilty. *United States v. Dickson*, 712 F.2d 952, 954, n.1 (1983).

3. The Decision Below Is Incorrect

The decision below is premised on incorrect factual assumptions. It should be emphasized that the part of the lower court's holding which goes to the defendant's "assertion" of the privilege, the involuntariness of his statements, and the reliance by the sentencing judge upon those statements, is based on an absent record. In addition, Cox and his attorney consented to the PSI. Since the information obtained by the probation officer was cumulative to that provided by the victims who had been previously acquainted with Cox through mutual drug trafficking, it is unclear whether the sentencing judge relied exclusively on the information in the PSI or whether the circumstances of the criminal conduct in the underlying offenses portrayed Cox as a drug dealer. In either case, the sentence was not enhanced. In any event the information obtained could not have been used to support convictions for other crimes.

The opinion below is also an incorrect application of constitutional principles. The scope of the Fifth Amendment privilege against self-incrimination is restricted to proceedings which carry a "danger to a witness forced to give testimony leading to the reflection of 'penalties affixed to criminal acts . . .'" *Ullmann v. U.S.*, 350 U.S. 422, 438-39, quoting *Boyd v. U.S.*, 116 U.S. 616, 634 (1886). Thus once a witness has been convicted for the transactions in question, his claim to the privilege is unavailing. *Reina v. U.S.*, 364 U.S. 507, 513 (1960). Once the defendant has admitted his guilt and awaits sentenc-

ing, when the purpose for gathering statements from the defendant is not punitive, his position is no different from that of the witness described above. The defendant, like the witness, faces no new range of penalties for the underlying prosecution other than those statutorily imposed for the crime itself. To hold otherwise suggests that a reluctant defendant would be entitled to a grant of immunity to prompt background information for his own sentencing.

The lower court's decision is wrong because it relied on *Estelle* and *Jones v. Cardwell*, cases inapposite to the facts at hand. The controverted statements at issue concerned the defendant's drug trafficking in general and in no way served to "incriminate" him in regard to the pending case or to future criminal charges. "After conviction, the danger of introducing responses to a probation officer's questions at the trial for the underlying offense is virtually nonexistent." *U.S. v. Gonzalez-Mares*, 752 F.2d 1485, 1490 n.5 (9th Cir. 1985).

The plea of nolo contendere, like a guilty plea, waives the right against self-incrimination. See V.R.Cr.P.11 and F.R.Cr.P.11. Once the privilege was waived, the information regarding a career of drug trafficking was relevant to the aims of sentencing.

Respondent's statements, moreover, cannot be viewed as "involuntary" in the constitutional sense, since the choice of whether to continue with the presentence interview without the presence of a representative from the public defendant's office cannot be viewed as "coercion". The respondent certainly was not in an analogous position to those individuals in the so-called "penalty" cases who were forced to forgo the protections of the privilege. *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984). He still retained his right to allocution under V.R.Cr.P.32(a)(1)(C).

The lower court's erroneous decision will have serious consequences for the persons charged with the gathering

of information used to aid the court in its sentencing determinations. Presentence preparations may be lengthened, leading to delay in sentencing. Courts will be thwarted since the policy of individualized sentencing will be undermined. Requiring *Miranda* warnings will raise other questions concerning the administration and waiver of those rights. These consequences are at odds with the information gathering function of the probation officer and the need of the court to be fully informed at sentencing.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court grant the petition for a Writ of Certiorari to review the decision of the Vermont Supreme Court or, in the alternative, to remand the cause to the Vermont Supreme Court with instructions for an evidentiary hearing to take place at the District Court of Vermont.

Respectfully submitted,

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Dated: January 2, 1987

APPENDICES

APPENDIX A

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions, Vermont Supreme Court, 111 State Street, Montpelier, Vermont 05602 of any errors in order that corrections may be made before this opinion goes to press.

SUPREME COURT
September Term, 1985

No. 84-105

STATE OF VERMONT

v.

RICK COX

[Filed Oct. 10, 1986]

On Appeal from District Court of Vermont,
Unit No. 2, Chittenden Circuit

Paul F. Hudson, J.

Jeffrey L. Amestoy, Attorney General, and Susan R. Harritt, Assistant Attorney General, Montpelier, for plaintiff-appellee

David W. Curtis, Defender General, Henry Hinton and William A. Nelson, Appellate Defenders, Montpelier, for defendant-appellant

PRESENT: Allen, C.J., Hill, Peck, Gibson and Hayes, JJ.

GIBSON, J. Defendant Richard Cox was convicted of three counts of simple assault in violation of 13 V.S.A. § 1023(a)(3). Originally charged with kidnapping, defendant entered nolo pleas to the amended charges and was sentenced to three consecutive terms of six to twelve months. Defendant raises two claims on appeal: (1) the sentencing court relied on information in the presentence report that was obtained in violation of defendant's privilege against self-incrimination and defendant's right to counsel; and (2) the sentencing court's reliance on unverified allegations of defendant's prior criminal activity violated the rule of *State v. Williams*, 137 Vt. 360, 364, 406 A.2d 375, 377 (1979), *cert. denied*, 444 U.S. 1048 (1980).

After defendant's conviction, the trial court ordered a presentence investigation (PSI), including an interview of defendant by the Department of Corrections pursuant to V.R.Cr.P. 32(c)(1). At sentencing, the court imposed a sentence that exceeded the recommendations of both parties, yet was within the statutory limits for the offense. 13 V.S.A. § 1023(b).

Defendant claims the sentencing judge relied on statements in the PSI that were taken after he asserted his Fifth Amendment privilege against self-incrimination, and that he made the statements involuntarily. We agree. Because we vacate defendant's sentence on the basis of his constitutional claim under the Fifth Amendment, we do not address his other claims.

The record reveals that a PSI interview was scheduled at the correctional institution where defendant was incarcerated awaiting sentencing. A public defender representing defendant sent an investigator from her office to offer assistance to defendant on the day of the interview. The investigator had not arrived when the probation offi-

cer began the interview with defendant. Defendant made a request to speak with the investigator from the public defender's office prior to answering any questions; the officer, however, indicated she would abandon the interview if defendant chose to await the arrival of the investigator.

The self-incrimination clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 6 (1963), provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The appellee, State of Vermont, argues that defendant waived his privilege against self-incrimination upon entry of his nolo contendere plea. V.R.Cr.P. 11(c)(4).

A nolo contendere plea is one "by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty." *North Carolina v. Alford*, 400 U.S. 25, 35 (1970) (footnote and citation omitted); see also *In re McMorrow*, 133 Vt. 472, 474, 346 A.2d 218, 220 (1975) (although defendant does not admit guilt with nolo contendere plea, right to jury trial, privilege against self-incrimination and right to be confronted by accusers are waived); V.R.Cr.P. 11(c)(4) (plea of guilty or nolo contendere waives "the privilege against self-incrimination, the right to a trial by jury or otherwise, and the right to be confronted with the witnesses against him . . .").

The waiver of the privilege against self-incrimination, however, relates only to the determination of guilt or innocence of the crime for which the plea is entered. *United States v. Johnson*, 488 F.2d 1206, 1209 (1st Cir. 1973). "While a defendant . . . waiv[es] the privilege with respect to the particular crime, . . . he would have no reason to suppose that he was otherwise forfeiting the

privilege." *Id.* at 1210 (citation omitted); see *United States v. Miller*, 771 F.2d 1219, 1235 (9th Cir. 1985) (defendant "retained his Fifth Amendment rights while awaiting sentencing" despite nolo plea). More specifically, "[a] defendant who has pleaded guilty but who is awaiting sentencing may invoke the Fifth Amendment privilege against self-incrimination in order to prevent the possible enhancement of his sentence." *United States v. Wilson*, 598 F. Supp. 138, 142 (E.D. Pa. 1984) (citing, among other cases, *Estelle v. Smith*, 451 U.S. 454, 462-63 (1981) ("We can discern no basis to distinguish between the guilt and penalty phases of [a defendant's] trial so far as the protection of the Fifth Amendment privilege is concerned.")).

The State argues further that even if defendant possessed the Fifth Amendment right not to incriminate himself, he failed to exercise or assert the privilege at the PSI interview. The transcript of the sentencing hearing, however, does not support the State's contention. Defense counsel informed the court that

> when the Probation Officer came to interview our client we in fact arranged for our investigator to go down and talk with him to prepare him for what would be coming forward, and he indicated to the Probation Officer that he really didn't want to talk to her until [the investigator on the case] was there. . . . And she indicated to him that that was fine but she wouldn't come back again. And made him feel as though he would have no opportunity to consult with us before talking with her. So that much of the material which has been included . . . are things that our client would have been advised about had he had an opportunity to speak with us first.

This statement, uncontroverted by the State, reveals defendant's reluctance to provide information to the probation officer before speaking to the investigator from the public defender's office.

We note that defendant asked for an investigator rather than an attorney. In *Fare v. Michael C.*, 442 U.S. 707, 724 (1979), the United States Supreme Court held that a juvenile defendant's request, made during custodial interrogation, for his probation officer is not a per se invocation of the defendant's Fifth Amendment rights. In so holding, the Supreme Court distinguished between the role of a probation officer and the role of an attorney in the criminal justice system. *Id.* at 719-24. The Court observed that a "probation officer is [an] employee of the State which seeks to prosecute the alleged offender[,]" *id.* at 720, and that the duties of a probation officer may often be "incompatible with the view that he may act as a counselor to a juvenile accused of crime." *Id.* at 720 n.5. Finally, the Court stated that "courts may take into account such a request in evaluating whether a juvenile in fact had waived his Fifth Amendment rights . . ." and that the question of waiver is to be determined "upon an inquiry into the totality of the circumstances surrounding the interrogation. . . ." *Id.* at 724-25.

This Court has noted that " '[v]aluable rights are not lost through their inartful assertion . . . .' " *State v. Mosher*, 143 Vt. 197, 203, 465 A.2d 261, 264 (1983) (quoting *United States v. Crowder*, 691 F.2d 280, 282 (6th Cir. 1982). In the case at hand, defendant, by indicating a desire to confer with the investigator for the public defender's office, demonstrated his concern that additional legal advice was necessary before proceeding with the interview. The investigator, an employee of defendant's legal representative, was clearly allied with defendant, a position much different from that occupied by a probation officer.

The record in this case reveals that the probation officer told defendant that if he delayed the PSI interview to confer with the investigator, she would abandon the interview. The officer, though not expressly denying defendant the right to additional legal consultation prior to question-

ing, conditioned the exercise of the right on his forfeiture of the interview itself. If defendant maintained his silence until he had the opportunity to speak with the investigator, he would have had no need for additional advice because, according to the probation officer, there would have been no PSI interview. In essence, defendant was presented with two choices: (1) to await the investigator and forfeit the interview, or (2) to proceed with the interview without additional advice. Additionally, defendant was incarcerated at the time of the PSI interview. See *Jones v. Cardwell*, 686 F.2d 754, 757 (9th Cir. 1982) (fact that defendant was in jail awaiting sentencing is a factor to be considered in determining voluntariness of statements made during PSI interview).

"The sentencing court should refuse to consider the defendant's statement in a pre-sentence report where the statement is demonstrated to have been, under all the circumstances, involuntary as induced by violence, threats, promises, or other improper influence." *Burch v. State*, —— Ind. ——, ——, 450 N.E.2d 528, 530 (1983); see also *Jones v. Cardwell*, *supra*, 686 F.2d at 757 (where jailed petitioner was instructed he had no choice but to answer questions put to him by probation officer during PSI, his confession of other crimes, extracted without warning as to the consequences, was a violation of his Fifth Amendment rights). We consider the condition under which defendant continued with the PSI interview to be coercive, thereby rendering defendant's statements involuntary, in violation of his rights under the Fifth Amendment.

Finally, the State argues that even if defendant's Fifth Amendment privilege against self-incrimination was violated, the sentencing court had identical information properly before it from the independent source of one victim's statement, also included in the PSI report. We agree that some of the objectionable material regarding defendants drug-related activities was included in the

victim's version. In defendant's version, however, the probation officer reported additional, more-detailed statements, rendering the State's argument unpersuasive.

We also cannot agree with the State's claim that defendant failed to show that the sentencing judge relied on defendant's statements during sentencing. Again, the record does not support the State's contention. The judge stated that

> Your report indicates that you have had a substantial amount of contact with drugs and drug abuse in the past. Whether or not your trip to Vermont was a travelling of a merchant, I don't know. From what some of the things you said that it may have been.

We conclude that consideration by the sentencing judge of defendant's incriminating statements made after he requested consultation violated defendant's Fifth Amendment rights.

Sentence vacated. The PSI report is to be stricken from the file; case remanded for preparation of a new PSI report and resentencing before a trial judge who has not reviewed the stricken presentence report.

FOR THE COURT:

/s/ Ernest W. Gibson III
Associate Justice

APPENDIX B

Supreme Court
Form No. 3

Entry Order

Supreme Court Docket No. 84-105
October Term, 1986

Docket No. 3044-8-83CnCr

STATE OF VERMONT

v.

RICK COX

[Filed Nov. 3, 1986]

Appealed From:
District Court of Vermont
Unit No. 2, Chittenden Circuit

In the above entitled cause the Clerk will enter:

The motion to reargue is denied

[ ] PUBLISH

[✓] DO NOT PUBLISH

BY THE COURT:

/s/ Frederic W. Allen
FREDERIC W. ALLEN Chief Justice

/s/ William C. Hill
WILLIAM C. HILL

/s/ Louis P. Peck
LOUIS P. PECK

/s/ Ernest W. Gibson III
ERNEST W. GIBSON III

/s/ Thomas L. Hayes
THOMAS L. HAYES Associate Justices

APPENDIX C

Title 28 Vermont Statutes Annotated § 204

§ 204.—Submission of written report; protection of records

(a) A court, before which a person is being prosecuted for any crime, may in its discretion order the commissioner to submit a written report as to the circumstances of the alleged offense and the character and previous record of the person, with recommendation.

(b) The court shall order such a report to be made before imposing sentence when the respondent is adjudged guilty of a felony, except as otherwise provided by rules of the supreme court. If the report has been made to any court within the state within a period of two years with reference to such individual, in connection with the same or another offense, submission of a copy of that report may fulfill the requirements of this section, if the court to which the report is to be submitted approves. Upon request, the commissioner shall furnish a state's attorney with a copy of any report made within the state once sentence has been passed in connection with the offense for which the report was made.

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APPENDIX D

RULE 11. PLEAS

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the effective administration of justice. A plea of nolo contendere shall have the same effect as a plea of guilty, except that it shall be admissible in evidence against the defendant in any criminal or civil proceeding only to the extent provided in paragraph (5) of the subdivision (e) of this rule. A conviction based upon a plea of nolo contendere shall be admissible in evidence for all purposes for which a conviction based upon a plea of guilty is admissible.

(c) Advice to Defendant. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge to which the plea is offered;

(2) the mandatory minimum penalty, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made;

(4) that if his plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by so pleading he waives the privilege against self-incrimination, the right to a trial by jury

of otherwise, and the right to be confronted with the witnesses against him;

(5) if there is a plea agreement and the court has not accepted it pursuant to subdivision (e)(3) of this rule, that the court is not limited, within the maximum permissible penalty, in the sentence it may impose;

APPENDIX E

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[15] and lascivious conduct charge, what is essentially conviction information. *Williams* decision is limited in its application to standard 2.3 of the American Bar Association's standard of probation. It is pretty much the basis of the *Williams* decision as this Court sees it. The prohibition of that ABA standard that our Court seems to have adopted is that in presenting a presentence report unproven allegations of arrest information cannot be included in the defendant's criminal record portion of the report. That was my dialogue with Miss Farley a few moments ago. I don't believe in its opinion in *Williams* that our Supreme Court was meant to limit certain other types of information that the Court could consider at sentencing that might include possibility of criminal conduct. I am referring now specifically to another Williams case which is *Williams versus New York.* This is at 337 U.S. 241, 1949 case where Williams was being sentenced for murder committed during the course of a burglary. The sentencing Court considered some 30 other burglaries that he had been involved in at the time he was sentenced. In a very interesting opinion by Justice Black it was indicated to the Court that this information could not only be beneficial to the State, could be beneficial to the defendant because it permitted the Court to set a rational sentence, and there could be a reasonable sentencing plan established [16] when you're dealing with the whole individual rather than with some of the materials being hidden. That consideration, by the way, was under the Fourteenth Amendment of the Constitution. That type of thing is followed in *Greg versus United States*, 394 U.S. 489, 1969 case. It indicated there aren't formal limitations on a presentence report contents. They may rest on hearsay, and they may not necessarily have a bearing on the crimes which the Defendant was charged, broader information. It is followed as well as *U.S. v. Tucker*, 404 U.S. at 443, 1972 case.

As far as the information in this case is concerned, it is particularly germane to what Mr. Cox is about when the Court considers what is in the report. Appears essentially to be reliable information because it's either information Miss Farley had or that the Defendant has given her. It's in the Court's assessment protected where it has satisfied the due process requirement and has satisfied the ABA standard. Also an opportunity in Rule 32 of the Criminal Rules to protest the report, to present oral testimony to the Court and present argument to the Court, to present any other type of information to the Court that's neeeded such as the letter I have received from the Defense today and I'm considering in this decision.

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[21] suitable sentence.

THE COURT: Well, Mr. Cox, if those three people in that car weren't terrorized, they were either immortal or foolish. Nine millimeter is a relatively deadly piece of equipment; and as we all know, that's the basis for the center part of the case.

Your report indicates that you have had a substantial amount of contact with drugs and drug abuse in the past. Whether or not your trip to Vermont was a travelling of a merchant, I don't know. From what some of the things you said that it may have been. This is not a beckoning country for that type of activity. I will conclude my statements in a minute. I certainly am optimistic in some respects from this report that you have decided to change your lifestyle with regard to illicit drugs; because that is part of the sentence, and I intend to recommend drug counseling as appropriate for you, because I do think that you can make progress.

You're a young man. You got an opportunity. You have prior convictions that have suggested to the Court that parole hasn't worked or probation hasn't worked in the past, but there again is an opportunity if you want

to turn the corner. I can sit here and impose any sentence that is within the statute, but it's up to you to decide that this is enough. You have gotten sick of [22] beating your head against the wall. The pain will stop when you quit. Okay? I'm concerned that there be a punishment in your case, because of what has occurred; and I think you probably came here today expecting that. At least you would have been less than candid with yourself if you didn't. I expect that rehabilitation will occur in your case, because that I expect will happen for anyone or at least should. I also expect that as a result of this case there will be some deterrence for you in the future for ever trying to commit this type of offense again, and I certainly hope the public gets the message.

For these three counts of simple assault, Mr. Cox, I commit you on the first count to the Commissioner of Corrections' custody for a term of not less than six, no more than twelve months. On the second count I commit you to a consecutive term of six to twelve months; and the third count I commit you to a consecutive term of six to twelve months.

Anything further counsel? There is credit awarded for the time the Defendant has been held in custody.

MS. FOWLER: No, thank you, your Honor.

THE COURT: Okay, you're remanded to the Commissioner's custody.

APPENDIX F

RULE 32. SENTENCE AND JUDGMENT

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(c) Sentencing Information.

(1) *Presentence Investigation, When Made.* A presentence investigation shall not be initiated until there has been an adjudication of guilt unless the defendant consents to such action. The commissioner of corrections shall make the presentence investigation and report to the court before the imposition or deferment of sentence or the granting of probation, except that the court, in its discretion, may dispense with the report, in the following situations:

(A) if the offense is a misdemeanor;

(B) if the defendant has two or more felony convictions;

(C) if the defendant refuses to be interviewed by a probation officer or requests that disposition be made without a presentence report;

(D) if it is impractical to verify the background of the defendant.

A report made prior to an adjudication of guilt shall not be submitted to the court or its contents disclosed to anyone until after such adjudication, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time and may, if the defendant's consent expressly so states, permit the defendant's attorney, or a defendant appearing pro se, and the attorney for the state to inspect the report.

(2) *Presentence Investigation Report.* The report of the presentence investigation shall contain any prior

criminal record of the defendant and such information on his characteristics, his financial condition, and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

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